

1989

## Horne v. Paulos : Petition for Writ of Certiorari

Utah Supreme Court

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James E. Morton; Ronald C. Wolthuis; Hatch, Morgan & Skeen; Attorneys for Plaintiff-Petitioner.  
J. Anthony Eyre; Kipp and Christian P.C.; Attorney for Defendant/Respondent.

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### Recommended Citation

Legal Brief, *Dr. Jonathan Horne v. Lonnie E. Paulos*, No. 890303.00 (Utah Supreme Court, 1989).  
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UTAH SUPREME COURT  
BRIEF

IN THE SUPREME COURT OF  
THE STATE OF UTAH

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DR. JONATHAN HORNE,	)	
	)	
Plaintiff-Petitioner,	)	PETITION FOR WRIT
	)	OF CERTIORARI
vs.	)	
	)	890303
DR. LONNIE E. PAULOS,	)	
	)	
Defendant-Respondent.	)	Case No. 880461-CA

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APPEAL FROM AN ORDER GRANTING DEFENDANT DR. LONNIE E. PAULOS' MOTION FOR SUMMARY JUDGMENT ENTERED BY THE THIRD JUDICIAL DISTRICT COURT IN AND FOR SALT LAKE COUNTY, STATE OF UTAH, THE HONORABLE LEONARD H. RUSSON, JUDGE AND FROM THE COURT OF APPEALS AFFIRMATION PURSUANT TO R.U.C.A. 31.

JAMES E. MORTON (A3739)  
RONALD C. WOLTHUIS #4699  
HATCH, MORTON & SKEEN  
1245 Brickyard Road, Suite 600  
Salt Lake City, Utah 84106

Attorneys for  
Plaintiff-Petitioner

J. Anthony Eyre  
Kipp & Christian  
City Centre I, #330  
175 East Fourth South  
Salt Lake City, Utah 84111

Attorney for  
Defendant-Respondent

**FILED**  
JUL 12 1989

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Clerk, Supreme Court

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IN THE SUPREME COURT OF  
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JAMES E. MORTON (A3739)  
RONALD C. WOLTHUIS #4699  
HATCH, MORTON & SKEEN  
1245 Brickyard Road, Suite 600  
Salt Lake City, Utah 84106

Attorneys for  
Plaintiff-Petitioner

J. Anthony Eyre  
Kipp & Christian  
City Centre I, #330  
175 East Fourth South  
Salt Lake City, Utah 84111

Attorney for  
Defendant-Respondent

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## STATUTES CITED

Utah Code Annotated, §78-12-25	1
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Prosser and Keaton on Torts, §128, P. 963 (5th Ed. 1984)	7
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## I. QUESTIONS PRESENTED FOR REVIEW

A. Does a physician, consulted for a second opinion, who makes statements reflective of alleged substandard care rendered by the first physician, (not in the context of an expert opinion for litigation) owe a duty of care to the first physician when it is reasonably foreseeable that the other physician will suffer harm if the second physician's statements are negligently conceived?

B. Does the State of Utah recognize an action for injurious falsehood, and, if so, what is the statute of limitations for such a cause of action.

## II. COURT OF APPEALS DECISION

An Order of Affirmance of the summary judgment of the District Court was entered on the 13th day of June, 1989. (A true and accurate copy of said Order is contained in the Appendix).

## III. STATEMENT OF JURISDICTION

This case comes before this Court on appeal from an Order of Affirmance of the judgment of the District Court which was entered on the 13th day of June, 1989. Summary judgment was granted in favor of Defendant/Respondent on the 23rd day of May, 1988. Jurisdiction is conferred upon this Court pursuant to Utah Code Annotated §78-2-2(3)(a) and §78-2-2(5) (1953) as amended.

## IV. CONTROLLING STATUTES

U.C.A. §78-12-25(3) (1953) as amended:  
Within four years:

(3) An action for relief not otherwise provided for by law.

U.C.A. §78-12-29(4) (1953) as amended:  
Within one year:

(4) An action for libel, slander, assault, battery, false imprisonment, or seduction.

V  
STATEMENT OF THE CASE

This action was initiated against Defendant-Respondent for negligence and injurious falsehood on October 23, 1987. At issue were certain harmful representations about the quality of certain medical procedures performed by the Plaintiff-Petitioner made by the Defendant-Respondent to third parties.

On or about May 23, 1988, Judge Leonard H. Russon granted Defendant-Respondent's Motion for Summary Judgment finding that Defendant owed no duty of care to Plaintiff and that Plaintiff's claims of injurious falsehood were barred by the one year statute of limitations of U.C.A. §78-12-29(4) (1953) as amended. Notice of appeal was filed on or about June 3, 1988. The appeal was originally filed with this Court but was "poured over" to the Court of Appeals. The Court of Appeals affirmed the District Court's Summary Judgment on June 13, 1989 without rendering an opinion pursuant to Rule 31, R.U.C.A.

VI  
STATEMENT OF FACTS

In or about June, 1982, Petitioner treated Teresa Ilene White for injuries she received in an auto-pedestrian accident. Petitioner set White's leg which had been severely fractured. Subsequently, White developed alignment deformities secondary to the fracture. (Amended Complaint, Para. 5, 6, 7, 8, and 9; Amended Answer, Para. 2, 3 and 4).

On or about October 10, 1983, Ms. White consulted the Defendant-Respondent, Dr. Lonnie E. Paulos, (hereinafter "Respondent" or "Respondent") for the purpose of evaluating the condition of her right tibia. (Amended Complaint, Para. 10; Respondent's response to Interrogatory No. 2). Respondent represented to Ms. White that the problems associated with her right leg were attributable to the malposition of her tibial fracture fragments which resulted from a procedure employed by Petitioner and the subsequent tolerance by Petitioner of an excessive degree of recurvatum and varus in the tibia. These representations were made without reference by Respondent to Petitioner's records or the records and X-rays of Cottonwood Hospital. (Amended Complaint, Para. 11; Answer Para. 6).

Later, in letters dated October 25, 1983, December 6, 1983, and April 2, 1984, Respondent communicated to Ms. White's legal counsel that the tibial position tolerated by Appellant was inconsistent with acceptable community standards and suggested that surgical correction in the form of an osteotomy should be entertained by Ms. White. (Amended Complaint, Para. 12; Respondent's response to Interrogatory No. 2 and 9; Answer Para. 6). For his evaluations and preparation of reports with his findings and opinions, Respondent received remuneration from Ms. White's counsel. (Respondent's Response to Interrogatory No. 9).



As a consequence of Respondent's communication with Ms. White's counsel, a lawsuit was filed in the Third Judicial District Court alleging that Petitioner was professionally negligent in his treatment of Ms. White. Said lawsuit against Appellant was ultimately dismissed with no settlement as a result of independent medical examinations of Ms. White by other orthopedic surgeons in Salt Lake County, who determined that Respondent's measurement of the alleged tibial aberration was inaccurate and that the degree of alignment deformity tolerated by Petitioner was well within community standards. (Amended Complaint, Para. 12; Appellant's response to Interrogatory No. 1, 2 and 4).

As a result of the lawsuit initiated by Ms. White, Petitioner was forced to expend sums in shared defense costs and experienced a dramatic increase in insurance premiums. (Appellant's Response to Interrogatory No. 3). Petitioner initiated an action against Respondent for negligence and injurious falsehood on October 23, 1987. (See Complaint). After answering the Complaint and taking some discovery, Respondent responded with a Motion for Summary Judgment, arguing, first: that he owed no duty to Petitioner since Petitioner was not in a contractual, fiduciary or physician/patient relationship with him; and second: that the one year statute of limitations applicable to libel and slander barred Petitioner's action for

injurious falsehood. Summary judgment was granted in favor of Respondent on or about May 23, 1988.

## VII ARGUMENT

### I. BECAUSE IT WAS REASONABLY FORESEEABLE THAT RESPONDENT'S ACTIONS WOULD HARM PETITIONER, RESPONDENT HAD A DUTY TO ACT IN A NON-NEGLIGENT MANNER.

The Utah Supreme Court has defined the "essential elements" of a negligence action as "(1) a duty of reasonable care owed by the Defendant to the Plaintiff; (2) a breach of that duty; (3) the causation, both actual and proximate of injury; and (4) the suffering of damages by the Plaintiff". Williams v. Melby, 699 P. 2d 723 (Utah 1985).

The Respondent contends that because there was not a contractual relationship between he and Petitioner, he had no duty to act in a non-negligent manner toward Petitioner. That a contractual relationship is necessary before an individual has a duty to act in a non-negligent manner is not the law of this, nor any other state. Malan v. Lewis, 693 P. 2d 661, 672 n. 15 (Utah 1981). See also Nazareno v. Urie, 638 P. 2d 671 (Alaska 1981); Metropolitan Gas Repair Serv. Inc., v. Kulik, 621 P. 2d 313 (Colo. 1981); Waggoner v. W. W. Steel Co., 657 P. 2d 147 (Okla. 1982); American Reciprocal Insurers v. Bessonette, 405 P. 2d 529 (Or. 1965). Instead, a proper analysis of the question of duty in this case must focus on the foreseeability of harm to

Petitioner from Respondent's actions. Palsgraf v. Long Island R.R., 162 N.E. 99 (Ct. App. NY. 1928).

Where damages are foreseeable, there is a general duty to act so as to avoid them. Milliner v. Elmer Fox and Co., 529 P. 2d 806, 808 (Utah 1974). Therefore, if damages from negligently making a false statement are foreseeable, even without privity, one may be held liable. Christensen v. Commonwealth Land Title Insurance Co., 666 P. 2d 302 (Utah 1983); See also Dugan v. Jones 615 P. 2d 1293 (Utah 1980).

In the present case, Respondent could reasonably foresee that Petitioner would be harmed by his negligent actions. Respondent communicated to Ms. White and her counsel that the work performed by Petitioner was below the standards of care in the community. Respondent obviously knew that such statements could damage Petitioner and therefore he had a duty to act in a non-negligent manner.

Petitioner contends that the instant action was improperly dismissed on Respondent's Motion for Summary Judgment. Grave questions remain unresolved on the propriety of Respondent's statements to Ms. White and her attorney, which were made without any reference to medical records and X-rays produced by Petitioner and Cottonwood Hospital before Ms. White's visit to Respondent. Questions also remain on the professional skill exercised by Respondent in the measurement of Ms. White's alleged

tibial aberration. Certainly it cannot be said as a matter of law that Petitioner could never be a reasonably foreseeable victim of negligent misrepresentations concerning the quality of his skill as a surgeon. Such foreseeability creates a duty as a matter of law. Petitioner must therefore be allowed to argue the question of negligence to a jury.

II. THE STATUTE OF LIMITATIONS DOES NOT BAR APPELLANT'S SUIT, SINCE INJURIOUS FALSEHOOD IS NOT GOVERNED BY THE ONE YEAR LIMITATION APPLICABLE TO LIBEL AND SLANDER.

Respondent contends that Petitioner's injurious falsehood cause of action is actually a claim for libel and/or slander and therefore is governed by the one year statute of limitations contained in 78-12-29 of the Utah Code Annotated. Respondent reasons that since Petitioner did not initiate legal action until some three years after Respondent wrote the subject letters to Ms. White's attorney, Petitioner's action for injurious falsehood is time barred. Respondent and the lower courts have failed to recognize that a claim for injurious falsehood is not the same as a claim for libel and/or slander and therefore does not fall under the one year statute of limitations contained in §78-12-29 of the Utah Code Annotated, but under the four year general statute of limitations contained in §78-12-25.

Although an action for injurious falsehood is loosely allied to defamation, they are not the same. Prosser and Keaton on Torts, Section 128, P. 963. (5th Ed. 1984). See also Idaho

Norland Corp., v. Caelter Industries, Inc., 509 Fed. Supp. 1070 (D. Colo. 1981); Guess, Inc., v. Superior Court, 122 Cal. Rptr. 79, 82 (Cal. App. 1986). Injurious falsehoods such as trade libel or product disparagement interfere with an individual's business. Unlike classical defamation, an injurious falsehood is not directed at an individual's reputation, but rather at the goods an individual sells or the character of his business or practice. See Prosser at 964.

In Idaho Norland the U. S. District Court for the District of Colorado dealt with the issue of which statute of limitations should apply for an injurious falsehood, an issue identical to that raised in the instant case. In drawing a distinction between claims for injurious falsehood and those for defamation the District court stated that:

Claims of trade libel and product disparagement protect economic relationships and fair competition. They are akin to private claims under anti-trust laws and other forms of trade regulations. The law of defamation, on the other hand, provides for 'protection of private personality' and reflects 'our basic concept of essential dignity and worth of every human being'.

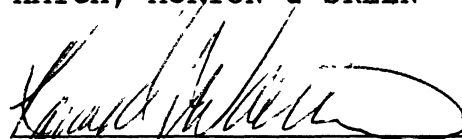
Id. at 1072. Using this reasoning, the Court concluded that a claim for injurious falsehood and defamation are not the same. Therefore, Colorado's one year libel and slander statute of limitations did not apply to actions for injurious falsehood. The Court went on to conclude that Colorado's six year statute of limitations for actions based on common law pleadings was the

appropriate limitation governing Plaintiff's injurious falsehood claims.

As shown above, Petitioner's cause of action for injurious falsehood cannot be characterized as an action for libel and/or slander and therefore is not limited by the one year statute applicable to libel and slander actions. Because there is not a specific statute of limitations applicable to actions for injurious falsehood, the trial court should have applied the general four year statute of limitations contained in Section 78-12-25(3) of the Utah Code Annotated, as "[a]n action for relief not otherwise provided for by law". Since Petitioner filed his action against Respondent within the four year limitation applicable to an injurious falsehood action, summary judgment in Respondent's favor based on the statute of limitations was improper.


Respectfully submitted this 12<sup>th</sup> day of July, 1989.

HATCH, MORTON & SKEEN

  
RONALD C. WOLTHUIS  
Attorney for Petitioner

MAILING CERTIFICATE

I hereby certify that four copies of the foregoing Petition for Writ of Certiorari were mailed to J. Anthony Eyre, at Kipp & Christian, City Centre I, #330, 175 East Fourth South, Salt Lake City, Utah 84111 on this 12<sup>th</sup> day of July, 1989..

  
\_\_\_\_\_  
RONALD C. WOLTHUIS  
Attorney for Petitioner

Tab A



FILED

JUN 13 1989

*C. J. Davidson*  
Clerk of the Court  
Utah Court of Appeals

IN THE UTAH COURT OF APPEALS

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Dr. Jonathan Horne,	)	
	)	
Plaintiff and Appellant,	)	ORDER OF AFFIRMANCE
	)	
v.	)	Case No. 880461-CA
	)	
Dr. Lonnie E. Paulos,	)	
	)	
Defendant and Respondent.	)	

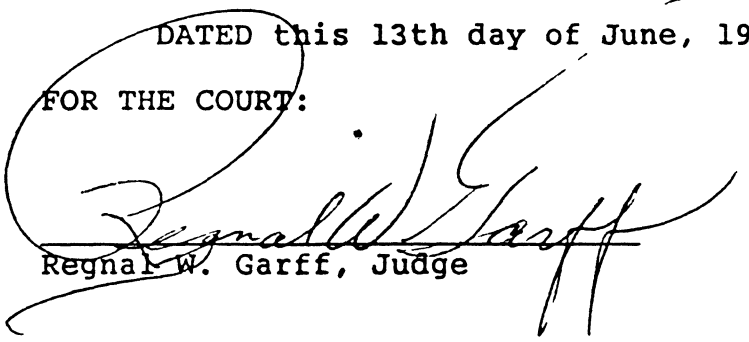
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Before Judges Garff, Davidson and Croft (Retired District Judge  
Sitting by Special Assignment) (On Rule 31 Hearing).

The summary judgment of the district court is affirmed.

DATED this 13th day of June, 1989.

FOR THE COURT:

  
Reginald W. Garff, Judge

CERTIFICATE OF MAILING

I hereby certify that on the 13<sup>th</sup> day of June, 1989, a true and correct copy of the foregoing ORDER OF AFFIRMANCE was mailed to each of the parties named below by depositing the same in the United States mail.

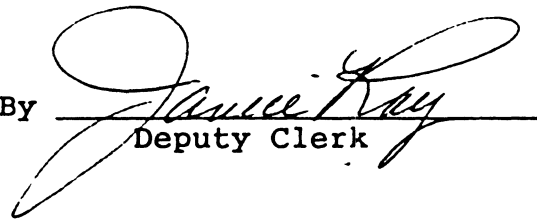
James E. Morton  
Hatch, Morton & Skeen  
Attorney for Appellant  
1245 Brickyard Road, Suite 600  
Salt Lake City, Utah 84106

J. Anthony Eyre  
Shawn McGarry  
Kipp & Christian  
Attorneys for Respondent  
City Centre I, #330  
175 East Fourth South  
Salt Lake City, Utah 84111

Third District Court  
Salt Lake County  
Dixon Hindley, Clerk  
240 East 400 South  
Salt Lake City, UT 84111  
Civil No. C87-6961

DATED this 13<sup>th</sup> day of June, 1989.

By

  
Deputy Clerk